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No. 90-1478

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

FRANK L. NACCARATO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Petitioner was convicted of conspiring to bribe a public official, in violation of 18 U.S.C. 201. The question presented is whether the individual to whom the bribes were paid was a "public official" within the meaning of Section 201(a).

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-12) is not reported, but the judgment is noted at 921 F.2d 282 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on December 18, 1990. The petition for a writ of certiorari was filed on March 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of con-

spiring to bribe a public official, in violation of 18 U.S.C. 201(b) and 371. He was sentenced to 18 months' imprisonment and was ordered to pay $50,000 in restitution. The court of appeals affirmed. Pet. App. 1-12.

1. The evidence at trial showed that petitioner conspired with co-defendants Myron Brinkman, Michael Orsborn, and Ken Eldridge to bribe Felipe Tagaban, the administrative officer of the Tlingit-Haida Regional Housing Authority (Tlingit), an Alaska state housing corporation.[1] Petitioner and his co-conspirators made two $10,000 payments to Tagaban in return for Tagaban's entering a lease, on behalf of Tlingit, for a warehouse the co-conspirators owned and for other favorable treatment. Pet. App. 3-4.

The Department of Housing and Urban Development dispensed some $3,500,000 to Tlingit between May 1983 and the spring of 1985 to promote renovation of low income housing in Juneau, Alaska. The funds were provided under the Comprehensive Improvement Assistance Program (CIAP), a special program conducted under the Housing Act of 1937, 42 U.S.C. 1437. Tlingit was required to obtain HUD's approval before spending any funds under the CIAP program. Pet. App. 2-3; Gov't C.A. Br. 3-4.

Tagaban was Tlingit's administrative officer and the coordinator of its participation in CIAP. Subject to the approval of a superior, Tagaban had authority to hire and fire employees, to negotiate contracts, and to locate warehouse or office space. Tagaban determined that Tlingit would need a warehouse for the supplies and equipment involved in its renovation program. Co-defendant Orsborn, an acquaintance of Tagaban, offered to help find a warehouse for Tlingit. Pet. App. 2-3; Gov't C.A. Br. 4.

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[1] Tagaban, Brinkman, and Orsborn pleaded guilty and testified on behalf of the government at petitioner's trial. Eldridge was acquitted. See Gov't C.A. Br. 10; C.A.E.R., Docket Entries 7.

In the summer of 1983, petitioner met with Orsborn and undertook to build a warehouse for Tlingit. Petitioner solicited co-defendant Brinkman's assistance in the project. Brinkman provided financing for the project, and he and petitioner selected a site on co-defendant Eldridge's land for the warehouse. Petitioner, Brinkman, and Eldridge formed a partnership, the Lemon Glacier Development Company, to complete the project. Pet. App. 3.

The partnership agreed to pay Orsborn a $25,000 finder's fee if he obtained a reliable tenant for the warehouse. Orsborn in turn told Tagaban that Tagaban would receive $10,000 if he signed a lease for the warehouse on Tlingit's behalf. Tagaban signed a lease on October 18, 1983. The lease called for Tlingit to pay $1.25 per square foot for a five-year rental term. The rental price was approximately twice the fair market rate for the warehouse space. Tagaban entered the lease on behalf of Tlingit even though he lacked authority to do so. In December of 1983, Tagaban signed a letter of intent, on behalf of Tlingit, indicating that Tlingit would lease office space at the warehouse for $1.65 per square foot. Pet. App. 3-4 & nn.1-2; Gov't C.A. Br. 6-7.

In March 1984, Tagaban contacted Orsborn and asked about the promised $10,000 payment. Orsborn told Tagaban to call petitioner. After Tagaban contacted petitioner, petitioner and Brinkman delivered $10,000 in cash to Tagaban. Pet. App. 4; Gov't C.A. Br. 7.

Petitioner, Brinkman, and Eldridge also controlled a company known as "Heavier Than Air," which performed repair and renovation work for Tlingit under the CIAP program. Heavier Than Air was paid more than $700,000 by Tlingit under that program. In September 1984, Brinkman delivered another $10,000 to Tagaban on behalf of petitioner, Brinkman, and Eldridge. Brinkman testified that he understood it to be a payment for Tagaban's continued

favorable treatment of their companies. Pet. App. 4; Gov't C.A. Br. 7-8.

In March 1985, Tlingit fired Tagaban after discovering that he had acted without authority in entering the warehouse lease with the Lemon Glacier partnership. Before he left Tlingit, however, Tagaban signed nine emergency repair contracts assigning some $500,000 in work to petitioner's company. Tagaban backdated the contracts to October 1984. Pet. App. 4 & n.3; Gov't C.A. Br. 8-9.

Prior to trial, petitioner moved to dismiss the indictment on the ground that Tagaban was not a "public official" covered by the federal bribery statute.[2] The district court denied the motion, and petitioner was convicted.

2. In an unpublished opinion, the court of appeals affirmed the conviction. Pet. App. 1-12. The court rejected petitioner's contention that Tagaban was not a "public official" within the meaning of 18 U.S.C. 201. Applying the standards outlined in *Dixson* v. *United States*, 465 U.S. 482, 486 (1984), the court of appeals noted that "[t]he determination of whether Tagaban was a 'public official' turns on the relationship between him and the Federal Government"—specifically, whether "Tagaban occupied a position of public trust with official federal responsibilities." Pet. App. 5, 6. The court found that "[b]y administering HUD funds, Tlingit subjected itself to federal constraints and restrictions"

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[2] Section 201(a)(1) defines a "public official," in pertinent part, as:

> an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government.

This provision was amended in 1986, but the amendments did not alter the substance of the definition and are not material to this case. See Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 46(a), 100 Stat. 3601.

and that "[a]s the coordinator of Tlingit's involvement with CIAP [Tagaban] had authority to negotiate contracts, and expend Federal Government funds." *Id.* at 6. Thus, the court concluded, "Tagaban's role in Tlingit is not distinguishable from the role of petitioners in *Dixson*." *Ibid.* Tagaban "was in a position of responsibility, acting on behalf of the Federal Government in administering expenditures of federal funds and implementing federal policy." *Ibid.*[3]

## ARGUMENT

Petitioner contends (Pet. 6-9) that Tagaban did not qualify as a "public official" within the meaning of Section 201.

As the court of appeals found, *Dixson* v. *United States*, *supra*, forecloses that contention. In *Dixson*, the defendants were officers of a private, non-profit corporation that administered and expended block grants disbursed by HUD under a federal urban renewal program. The defendants were convicted of violating 18 U.S.C. 201(c) by soliciting kickbacks from contractors seeking to perform work on urban renewal projects. Based upon the language and legislative history of Section 201, the Court concluded that Congress did not intend to restrict the definition of "public official" to "those persons in an employment or agency relationship with the Federal Government" or to "individuals tied to the Federal Government by direct contractual obligations." 465 U.S. at 493-494. The Court explained that "[t]o determine whether any particular individual falls within this

[3] The court also held that there was sufficient evidence to sustain petitioner's conviction, that the district court did not commit plain error in declining to instruct on the offense of giving an illegal gratuity, and that the district court did not abuse its discretion in ordering petitioner to pay $50,000 in restitution. Pet. App. 7-12. Petitioner does not seek further review of those determinations.

category, the proper inquiry is not simply whether the person ha[s] signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201." *Id.* at 496.

The facts of this case are strikingly similar to those of *Dixson*. Tlingit, like the non-profit corporation involved in *Dixson*, was the recipient of federal funds, intended for use in renovation projects, that were expended in accordance with detailed federal standards. See Pet. App. 2, 5-6; 465 U.S. at 486-489. Tagaban had operational responsibility—comparable to that of the defendants in *Dixson*—for Tlingit's participation in the CIAP program. See Pet. App. 2-3; 465 U.S. at 497. *Dixson* thus compels the conclusion that Tagaban was a "public official" within the meaning of Section 201. The court of appeals' straightforward application of *Dixson* to the particular facts of this case presents no question calling for this Court's review.

Contrary to petitioner's contention (Pet. 7), it is immaterial that Tlingit was not wholly dependent upon federal funds. In *United States* v. *Strissel*, 920 F.2d 1162, 1165-1166 (1990), the Fourth Circuit rejected the same contention in a case involving the CIAP program and a local housing authority indistinguishable from Tlingit. The court explained that although the defendant "also had some state responsibilities and state funding," "[h]e administered federal funds in a federal program, and the nature of his responsibilities * * * was clearly federal." *Id.* at 1165, 1166. Accord *United States* v. *Velazquez*, 847 F.2d 140, 142 (4th Cir. 1988) (a jailer employed by a county who, pursuant to a contract between the county and the federal government, supervised federal prisoners housed together with state inmates at a county jail was a "public official"). See also *United States* v. *Madeoy*, 912 F.2d 1486, 1494-1495 (D.C. Cir. 1990)

(VA-approved fee appraiser was a public official despite the fact that he was not employed by the federal government), cert. denied, 111 S. Ct. 1008 (1991).

Similarly, the fact that Tagaban lacked actual authority to enter a lease with the Lemon Glacier partnership does not undercut his status as a public official within the meaning of Section 201. See Pet. 8. As the court below found, Tagaban had substantial authority under the housing renovation program, including the authority to hire and fire employees, to negotiate contracts, and to commit Tlingit's funds, subject to the approval of its executive director. "Although Tagaban was not the ultimate authority in Tlingit, he had a substantial role in the housing authority's implementation of CIAP." Pet. App. 6. He held "a position of responsibility, acting on behalf of the Federal Government in administering expenditures of federal funds and implementing federal policy." *Ibid.* Under the standard set forth in *Dixson*, therefore, Tagaban was a "public official."[4]

Finally, like the defendants in *Dixson* (see 465 U.S. at 490), petitioner relies on *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975), and *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976). In both of those cases, the Second Circuit reversed convictions based upon kickbacks paid to a city employee who was involved in the Model Cities program, a program financed in part with federal funds. To the extent that *Del Toro* and

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[4] Petitioner also asserts (Pet. 8) that there is nothing in the record to show that Tagaban's salary was paid in whole or part from federal funds. Although the source of Tagaban's salary does not control the question whether he was a public official, see *United States* v. *Velazquez*, 847 F.2d at 142, the record reflects that federal funds were used to make up the difference between Tlingit's receipts and its expenditures. Gov't C.A. Br. 16. Thus, Tagaban was paid, at least in part, with HUD funds.

*Loschiavo* suggest that an individual must be employed by or report directly to the federal government in order to qualify as a "public official," they are no longer good law. As noted, *Dixson* squarely held that the federal bribery statute is not restricted to "persons in an employment or agency relationship with the Federal Government." 465 U.S. at 493-494. Since *Dixson*, moreover, the Second Circuit has indicated that *Del Toro* and *Loschiavo* turned on the fact that "the funds at issue in the case—although substantially generated by a federal agency—were administered and controlled by the city, not the federal government." *United States* v. *Romano*, 879 F.2d 1056, 1059 (2d Cir. 1989). In this case, by contrast, "HUD approval was required prior to any expenditure of funds pursuant to CIAP." Pet. App. 3. There is therefore no conflict between the court of appeals' decision in the instant case and decisions of the Second Circuit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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